STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP942-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

ROBERT DARIS SPENCER,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT-CROSS PETITIONER

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TABLE OF CONTENTS

Page

ISSUES PRESENTED 8

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 10

STATEMENT OF THE CASE 10

STANDARDS OF REVIEW 17

ARGUMENT 18

I. The circuit court didn't violate Spencer's right to counsel. If it did, the error was harmless. 18

A. A defendant has a right to counsel at all critical stages of the criminal process. 18

B. The circuit court's ex parte conference with Juror 2 was not a critical stage. 22

C. Any error was harmless. 27

1. Harmless-error analysis applies. 27

2. There's not a reasonable possibility that the alleged error contributed to Spencer's conviction. 30

II. Spencer forfeited his remaining challenges 36

A. A defendant must properly preserve most issues to raise them on appeal. 36

B. Spencer didn't raise his remaining challenges at the circuit court. 37

III. Spencer hasn't established a constitutional violation. 40

IV. This Court should affirm the circuit court's decision denying a mistrial on alternative grounds. 42

A. If a circuit court reaches the right result for the wrong reason, it will be affirmed. 43

B. A mistrial is an extreme remedy..... 43

C. Nothing prejudicial necessitated a mistrial here. 43

V. The circuit court's process for discharging Juror 2 didn't constitute an erroneous exercise of discretion, and any error was harmless. 44

CONCLUSION..... 46

TABLE OF AUTHORITIES

Cases

Bell v. Cone,
535 U.S. 685 (2002) 19, 27

Gerstein v. Pugh,
420 U.S. 103 (1975) 21

Gilbert v. California,
388 U.S. 263 (1967) 21, 25

Herring v. New York,
422 U.S. 853 (1975) 28, 29

Hinton v. United States,
979 A.2d 663 (D.C. 2009) 29, 31, 32, 35

In re Commitment of Curiel,
227 Wis. 2d 389, 597 N.W.2d 697 (1999) 40

In re S.M.H.,
2019 WI 14, 385 Wis. 2d 418, 922 N.W.2d 807..... 29

Liberty Trucking Co. v. Dep't of Indus., Lab. & Hum. Rels.,
57 Wis. 2d 331, 204 N.W.2d 457 (1973) 43

Lockhart v. McCree,
476 U.S. 162 (1986) 43, 44

Marshall v. Rodgers,
569 U.S. 58 (2013) 18

Penson v. Ohio,
488 U.S. 75 (1988) 27, 28

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 27

Schmidt v. Foster,
911 F.3d 469 (7th Cir. 2018) .....18, *passim*

Smith v. Robbins,
528 U.S. 259 (2000) 27

State v. Adams,
221 Wis. 2d 1, 584 N.W.2d 695 (Ct. App. 1998)..... 43, 44

State v. Alexander,
2013 WI 70, 349 Wis. 2d 327,
833 N.W.2d 126 ..... 19, 26, 28

State v. Anderson,
2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74..... 19, 23, 27

State v. Avery,
2011 WI App 124, 337 Wis. 2d 351, 804 N.W.2d 216..... 35

State v. Bjerkaas,
163 Wis. 2d 949, 472 N.W.2d 615
(Ct. App. 1991)..... 19, 23, 27

State v. Bodoh,
226 Wis. 2d 718, 595 N.W.2d 330 (1999) 36, 37

State v. Bunch,
191 Wis. 2d 501, 529 N.W.2d 923 (Ct. App. 1995)..... 17

State v. Burton,
112 Wis. 2d 560, 334 N.W.2d 263 (1983) .....27, *passim*

State v. Coffee,
2020 WI 1, 389 Wis. 2d 627, 937 N.W.2d 579 17

State v. Delgado,
223 Wis. 2d 270, 588 N.W.2d 1 (1999) 44

State v. Erickson,
227 Wis. 2d 758, 596 N.W.2d 749 (1999) 39

State v. Fuerst,
181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994)..... 41

State v. Gilliam,
2000 WI App 152, 238 Wis. 2d 1, 615 N.W.2d 660 44

State v. Gribble,
2001 WI App 227, 248 Wis. 2d 409,
636 N.W.2d 488 ..... 20, 26, 31, 44

State v. Harris,
2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409..... 41

State v. Holt,
128 Wis. 2d 110, 382 N.W.2d 679 (Ct. App. 1985)..... 43, 44

State v. Huebner,
2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727..... 36, 39

State v. Hunt,
2014 WI 102, 360 Wis. 2d 576, 851 N.W.2d 434..... 30

State v. Johnson,
74 Wis. 2d 169, 246 N.W.2d 503 (1976) 40

State v. Knapp,
111 Wis. 2d 380, 330 N.W.2d 242
(Ct. App. 1983)..... 21, 24, 25

State v. Koller,
2001 WI App 253, 248 Wis. 2d 259,
635 N.W.2d 838 ..... 19, 27, 30, 35

State v. Lehman,
108 Wis. 2d 291, 321 N.W.2d 212 (1982) 17, 24, 44, 45

State v. Mills,
107 Wis. 2d 368, 320 N.W.2d 38
(Ct. App. 1982)..... 19, 23, 31

State v. Monahan,
2018 WI 80, 383 Wis. 2d 100, 913 N.W.2d 894..... 32

State v. Phillips,
218 Wis. 2d 180, 577 N.W.2d 794 (1998) 17

State v. Pinno,
2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207..... 39

State v. Post,
197 Wis. 2d 279, 541 N.W.2d 115 (1995) 40

State v. Roberson,
2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813..... 41

State v. Schmidt,
2012 WI App 113, 344 Wis. 2d 336,
824 N.W.2d 839 ..... 21, 25, 26

State v. Sorenson,
143 Wis. 2d 226, 421 N.W.2d 77 (1988) 43

State v. Tulley,
2001 WI App 236, 248 Wis. 2d 505,
635 N.W.2d 807 .....19, *passim*

State v. Wickstrom,
118 Wis. 2d 339, 348 N.W.2d 183 (Ct. App. 1984)..... 21

Swain v. Alabama,
380 U.S. 202 (1965) 14

United States v. Ash,
413 U.S. 300 (1973) 18, 21, 22, 25

United States v. Clarke,
227 F.3d 874 (7th Cir. 2000)..... 43

United States v. Cronic,
466 U.S. 648 (1984) 27

United States v. Gagnon,
470 U.S. 522 (1985) .....19, *passim*

United States v. Powell,
652 F.3d 702 (7th Cir. 2011) 41

Wright v. Van Patten,
552 U.S. 120 (2008) 27

ISSUES PRESENTED

1. A defendant has a right to counsel when he requires aid in coping with legal problems or assistance in meeting his adversary. At Defendant-Appellant-Petitioner Robert Daris Spencer's trial for felony murder, the only black juror fell ill after the close of evidence but before deliberations. Outside the presence of counsel, the court questioned the juror about her illness and ability to proceed. It then conferred with counsel for both sides. Everyone agreed to wait for a while. Defense counsel also posed a question for the juror, which the court relayed. Satisfied that the juror was sick, the court excused her for cause. Defense counsel then moved for a mistrial and renewed an earlier challenge to the racial composition of the jury pool.

Was the ex parte communication between the judge and juror a critical stage, such that Spencer was denied his right to counsel? If so, was the error harmless?

The circuit court ruled that Spencer was not denied his right to counsel and that any error was harmless.

The court of appeals assumed a constitutional violation and found harmless error.

This Court should hold that Spencer was not denied his right to counsel because he did not need help confronting a legal problem during the alleged critical stage. Alternatively, the error was harmless.

2. A defendant forfeits most issues by failing to preserve them at the circuit court. Spencer raised his remaining challenges—centered on remarks that the circuit court made in denying his motion for a mistrial—for the first time at the court of appeals.

Are Spencer's remaining claims forfeited, and if so, are there good reasons to overlook forfeiture?

The court of appeals deemed Spencer's remaining challenges forfeited.

This Court should apply forfeiture because Spencer did not preserve his challenges at the circuit court, his claims rely on a faulty premise, overlooking forfeiture would encourage gamesmanship, and the circuit court should have received the opportunity to explain its remarks.

3. After the sick juror was discharged, defense counsel moved for a mistrial based on a concern that the jury would not be fair and impartial without a black juror. In denying the motion, the circuit court commented on the race of the trial participants.

If this Court overlooks Spencer's forfeiture, has he proved that the circuit court's comments violated his rights to due process and equal protection?

This Court should hold that Spencer has failed to prove a constitutional violation. Alternatively, any error was harmless.

4. If this Court overlooks Spencer's forfeiture, did the circuit court erroneously exercise its discretion in denying Spencer's motion for a mistrial by commenting on the race of the trial participants?

This Court should affirm on alternative grounds because the circuit court was not given a chance to explain its remarks and the circumstances plainly did not warrant a mistrial.

5. If this Court overlooks Spencer's forfeiture, did the circuit court's process for discharging the sick juror constitute an erroneous exercise of discretion?

This Court should hold that the circuit court did not err because it carefully considered Juror 2's dismissal for cause. Alternatively, any error was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

The State charged Spencer.

In 2014, the State charged Spencer with felony murder and being a felon in possession of a firearm. (R. 1:1.) The State's felony-murder theory was that Spencer robbed R.S., and as a result, Spencer's cohort, T.M., died. (R. 1:3–4.) Spencer went to trial.

At trial, the evidence showed that Spencer robbed his business partner, R.S., causing T.M.'s death.

The police investigation, presented as evidence at trial, revealed: (1) T.M. died from a gunshot wound, (2) the night he died, there were multiple gunshots in close succession near where police found his body, (3) the gunshots came from two different guns in two different locations, and (4) Spencer robbed R.S., causing these events.

On the night in question, officers "responded to a report of shots fired in the area of 3402 North 23rd Street in Milwaukee." (Spencer's App. 103.) They "discovered T.M. laying on the sidewalk in a pool of blood with a gun shot wound to the head." (Spencer's App. 103.) T.M.'s death was ruled a homicide. (R. 181:218–19.)

There were multiple gunshots in close succession that night, near where police found T.M.'s body. Two residents of the neighborhood heard gunshots within a small timeframe. (R. 179:62, 64–65, 67–69.) The "ShotSpotter" recorded eight gunshots in a matter of seconds. (R. 181:94, 99–100, 106.) An officer close to the area heard several gunshots, too. (R. 179:76–77.)

The gunshots came from two different guns in two different locations. One shooter fired from a kitchen window at R.S.'s residence. (R. 180:11–12, 14–27, 30–31, 79–85; 181:225–26.) The other fired near where police found a gold minivan and T.M.'s body. (R. 36; 56; 57; 180:33–35; 181:53, 226–27.)

Lerone Towns provided important testimony as to what happened that night. He was hired to tow a car to R.S.'s home on North 23rd Street. (R. 180:12; 181:87–88, 125–26, 130–31; 182:25–28.) As Towns completed paperwork, R.S. headed toward his house for money. (R. 181:132–34.) Towns heard a "commotion" and saw two men confronting R.S. (R. 181:134–35.) Towns did not see their faces but witnessed a short conversation and some "scuffling and tussling." (R. 181:136–38.) One of the suspects then pulled out a gun and reached into R.S's pockets. (R. 181:138–40.)

The armed suspect dragged R.S. across the street as the other suspect followed. (R. 181:140–42.) Everyone was out of Towns's view. (R. 181:142.) Less than one minute later, Towns heard "nothing but gunfire" coming from the direction where the suspects dragged R.S. (R. 181:142–43.) He then saw R.S. turn the corner and run past him. (R. 181:144–45.)

Towns promptly got into his truck and left. (R. 181:145.) He later reconnected with R.S. to complete the tow at a different location. (R. 181:146–47, 151.) R.S. showed up with a man identified as "Mr. Green," who did not appear to be one of the three individuals involved in the robbery. (R. 181:151.)

R.S. was the State's key identification witness at trial because he told police that Spencer was the man who robbed and shot at him. (R. 1:3–4.) R.S. believed that Spencer's cohort, T.M., was simply "forced to be there." (R. 1:3.)

R.S. told the jury that he had known T.M. since kindergarten. (R. 182:23.) R.S. also knew Spencer—who goes by the nickname "D-dog"—for a "[f]ew months." (R.

182:23–24.) The prosecutor then drew R.S.'s attention to the night at issue, asking whether he recalled "an incident involving [himself], the defendant, and [T.M.]." (R. 182:24–25.) R.S. answered yes. (R. 182:25.)

Shortly thereafter, though, R.S. changed course. He acknowledged that T.M. was at the robbery but said he "didn't recognize" the man with the gun who robbed him. (R. 182:31–35.)

The prosecutor immediately confronted R.S. with his police statement, forcing R.S. to admit that he previously identified Spencer as the armed robber. (R. 182:31–32.) Per R.S.'s initial account, the jury learned that Spencer took $400 and R.S.'s cell phone before dragging R.S. into the street. (R. 182:34–35.) R.S. believed that Spencer was taking him to a nearby gold minivan. (R. 182:36.) R.S. broke free and ran away, causing Spencer to shoot at him. (R. 182:36–37.) R.S. did not fire any shots during the encounter. (R. 182:37.) But his roommate, Danny, shot from their residence to protect him. (R. 182:29, 37–38.)

R.S. told the jury that at the time of the robbery, he owed Spencer $5000 from a business they ran together. (R. 182:40.) From what R.S. heard, Spencer had been looking for him to settle the debt. (R. 182:40.) Yet, R.S. still claimed not to recognize the man who approached him that night and asked, "Where is the money at?" (R. 182:34, 41.) According to R.S., police "threatened" him into identifying Spencer. (R. 182:32.)

But R.S. didn't just tell police that Spencer was the armed robber. *Before* he talked to police, he told T.M.'s sister that "D'Dog" was responsible for her brother's death. (R. 183:5–7, 10, 31–32.) R.S. said he "fucked up with D'Dog." (R. 183:8.) He described how "D'Dog" and T.M. pulled up in a van and confronted him, and how Spencer ultimately shot at him.

(R. 183:7–9.) R.S. promised to tell detectives what happened. (R. 183:9–10.)

R.S.'s statements were not the only evidence connecting Spencer to the robbery. Police searched the minivan parked near T.M.'s body and found a traffic citation and car-shop receipt in Spencer's name. (R. 83; 181:45–49, 53.) Officers also lifted Spencer's fingerprint off the van. (R. 181:75.) And Spencer and T.M. were spotted together with the minivan hours before T.M. died. (R. 181:83–97.)

Before deliberations, Juror 2 fell ill.

The day of deliberations, the circuit court went on the record at 8:59 a.m. (R. 184:4.) It heard argument regarding proposed jury instructions and went off the record "to get some verdict forms." (R. 184:4–19.)

45 minutes later, the court went back on the record. (R. 184:20.) The court explained that during the recess, it learned that Juror 2—the only black juror—was sick. (R. 184:20–21.) "[W]ith the assistance of one of the bailiffs," the court "had the juror" leave "the jury room" and go into chambers for "a quiet place" to rest. (R. 184:20.) The court continued,

> [Juror 2] is not feeling well enough to proceed. And when I asked her about 15, 20 minutes ago if she thought she would feel well enough to proceed in any particular length of time, her answer was very tentative and she said unlikely basically and she didn't know how long she would need before she could participate. She is, if you want to know the details, queasy, light headed, just unwell generally.
>
> I did inquire. She said she's been having some health issues as of late and believes that these are -- her words -- "the reminisce" of some health issues that have been going on I think last week.

(R. 184:20–21.)

The court further noted that it "conferred with the attorneys" "in the back." (R. 184:21.) It "advised the attorneys

going along what was the cause for the delay and what was being done to assist the juror." (R. 184:21.) The court stated, "we agreed to wait and we've now waited a significant amount of time. And I have to be mindful that we have the remaining 12 [jurors] sitting back in the jury room waiting to move forward." (R. 184:21.)

After the court spoke with the parties, "the defense asked a question" for the juror. (R. 184:21.) The court explained, "I inquired along the lines of the concern that the defense had. I asked the juror if her stress or her not being well enough to proceed had anything to do with her service as a juror or with the behavior of any of the other jurors." (R. 184:21–22.) Juror 2's response was, "Oh, no. This has nothing to do with the trial." (R. 184:21.) The court was "satisfied with" Juror 2's response. (R. 184:21.)

The court said it understood "the significance" of Juror 2's illness because she was "the only African-American juror on the panel." (R. 184:21.) However, the court was "not prepared to put her health at risk by having her continue and go to deliberations when she is so unwell." (R. 184:21.) It then turned to the parties to state their positions, noting, "At this point I will tell you I have resolved that we will go forward with the 12." (R. 184:22.)

The State "agree[d] with everything the Court said as to the recitation of what the Court had told [the parties]" before going on the record. (R. 184:22.) It further agreed "that based on the health issues that [Juror 2] should be struck for cause." (R. 184:22.)

Defense counsel reminded the court that she brought an unsuccessful "Swain[1] challenge" during voir dire based on the racial composition of the jury pool. (R. 184:23–24.) Counsel

[1] *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

continued, "We're now in a situation where we have no African-American jurors." (R. 184:24.) She moved for a mistrial and renewed her "challenge under Swain." (R. 184:24–25.)

The court denied Spencer's motion for a mistrial. (R. 184:25.) It then commented on the absence of a cross-racial identification in this case:

> What I will say for the record is that had this fact pattern been different than what it is, that we may be having a very different discussion. This is not a case where this is an identification that actually took place, No. 1. And No. 2, this is not -- there is not an issue here in terms of any cross-ratio [sic] identification or a crime allegedly committed by a person of one race upon the victim of another race, however you want to slice it.

(R. 184:26.) The court proceeded to "note for the record" that Spencer was black, and then it listed all the witnesses at trial who were black. It vaguely explained why it identified the race of Spencer and the witnesses:

> I think it's important to note their race for the record as one as the defense has raised the issue. Sometimes records unfortunately are silent because everybody assumes that they're all sitting here in the trial court. So I will add those facts to the record as the Court has observed them through the course of the trial.
>
> And as I indicated, if we had individuals of other races involved as witnesses in this case, we may be having a different conversation. But we don't so I decline to speculate. . . . Your arguments are noted. Your objection is noted. Your motion for a mistrial is noted and denied.

(R. 184:26–27.) There was no further objection. (R. 184:27.)

The jury found Spencer guilty, and he filed a postconviction motion on two grounds.

Ultimately, the jury found Spencer guilty of both charges. (R. 185:5.)

Spencer filed a postconviction motion, raising two claims. First, he alleged that his trial counsel was ineffective for not objecting to hearsay. (R. 147:7–10.) Second, Spencer argued that the circuit court violated his right to counsel when it questioned Juror 2 outside the presence of his attorney. (R. 147:12.)

The court denied Spencer's motion without a hearing. It determined that no right-to-counsel violation occurred because its questioning of Juror 2 did not constitute a critical stage. (R. 163:7.) It further decided that any error was harmless. (R. 163:8.) Regarding the ineffective-assistance claim, the court held that the record conclusively showed no prejudice. (R. 163:5–6.)

Spencer appealed and added new claims.

On appeal, Spencer renewed his right-to-counsel and ineffective-assistance claims. (Spencer's App. 102.) Additionally, he contended that "the trial court's decision to dismiss a juror for cause violated his right to due process and equal protection and was an erroneous exercise of the trial court's discretion." (Spencer's App. 102.)

The court of appeals deemed forfeited Spencer's new claims because he "failed to raise them below, either by objecting at the time of trial or by addressing them in his postconviction motion." (Spencer's App. 106.)

Regarding Spencer's right-to-counsel claim, the court of appeals held that "any assumed error in the trial court's interview of the juror was harmless." (Spencer's App. 108.) It reasoned that the court's communications with Juror 2 were innocuous. (Spencer's App. 111.) It noted, "The record is clear

that counsel was still included in the process of deciding what to do in response to the juror falling ill." (Spencer's App. 110.)

The court of appeals further reasoned, "[W]e must necessarily conclude that any assumed error was harmless because Spencer received what he was entitled to, namely a fair and impartial jury and the communications cannot be said to have influenced the jury's verdict." (Spencer's App. 111.) "There is nothing in the record," it continued, "and Spencer fails to argue, that the remaining twelve jurors, none of whom had any ex parte communications with the trial court, were biased or partial." (Spencer's App. 111.)

This Court granted Spencer's petition for review.

STANDARDS OF REVIEW

Generally, this Court reviews constitutional issues under a "two-step" standard: it defers to the lower court's findings of historical fact, but it independently applies the law to the facts. *State v. Phillips*, 218 Wis. 2d 180, 190, 577 N.W.2d 794 (1998).

This Court independently decides whether an error is harmless and whether forfeiture applies. *State v. Coffee*, 2020 WI 1, ¶ 17, 389 Wis. 2d 627, 937 N.W.2d 579.

This Court reviews decisions denying a mistrial and discharging a juror for an erroneous exercise of discretion. *State v. Bunch*, 191 Wis. 2d 501, 506–07, 529 N.W.2d 923 (Ct. App. 1995); *State v. Lehman*, 108 Wis. 2d 291, 299, 321 N.W.2d 212 (1982).

ARGUMENT

I. The circuit court didn't violate Spencer's right to counsel. If it did, the error was harmless.

A. A defendant has a right to counsel at all critical stages of the criminal process.

The Sixth Amendment ensures a "right to counsel at all critical stages of the criminal process." *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (citation omitted). "The right to counsel in Anglo-American law has a rich historical heritage, and [the Supreme] Court has regularly drawn on that history in construing" it. *United States v. Ash*, 413 U.S. 300, 306 (1973).

History reveals two primary concerns contributing to the right to counsel. The first involved the "awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system." *Ash*, 413 U.S. at 307. Thus, the concern was that the accused needed help when confronting "the intricacies of the law." *Id.* at 307–09. The second primary "motivation for the [right to counsel] was a desire to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Id.* at 309. In other words, the concern was that the accused required assistance when facing "the advocacy of the public prosecutor." *Id.*

The Supreme Court "has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Ash*, 413 U.S. at 311. Thus, "the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.* at 313.

But it's fair to say that "[t]he Supreme Court has not provided a concise explanation of what constitutes a critical stage." *Schmidt v. Foster*, 911 F.3d 469, 479 (7th Cir. 2018).

For example, nearly 30 years after *Ash*, the Court broadly "described a critical stage as a 'step of a criminal proceeding' that holds 'significant consequences for the accused.'" *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 696 (2002)).

"However described, the Supreme Court has recognized a range of pretrial, trial, and posttrial events to count as critical stages." *Schmidt*, 911 F.3d at 480. Critical stages include postindictment interrogations and lineups, arraignments, preliminary hearings, plea hearings, sentencing hearings, and appeals. *See id*.

In Wisconsin, critical stages also include voir dire and instructing the jury. *State v. Tulley*, 2001 WI App 236, ¶ 6, 248 Wis. 2d 505, 635 N.W.2d 807; *State v. Mills*, 107 Wis. 2d 368, 370, 320 N.W.2d 38 (Ct. App. 1982). Further, "the right to counsel attaches for communications between the circuit court and the jury during deliberations." *State v. Anderson*, 2006 WI 77, ¶ 69, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶ 28, 349 Wis. 2d 327, 833 N.W.2d 126. *Anderson* involved a court's ex parte communication with the jury about what evidence it could view during deliberations. *Id.* ¶¶ 13–14. Courts have consistently held that that type of event is critical. *See State v. Koller*, 2001 WI App 253, ¶¶ 61–62, 248 Wis. 2d 259, 635 N.W.2d 838; *see also State v. Bjerkaas*, 163 Wis. 2d 949, 957, 472 N.W.2d 615 (Ct. App. 1991) (ex parte communication about whether the jury could consider an entrapment defense).

Equally important for this Court's purposes are those events that have *not* been considered critical stages. Most on point is *Gagnon*, where the trial court excluded several defendants and their counsel from an in-chambers meeting with a potentially biased juror. *See United States v. Gagnon,* 470 U.S. 522, 523–24 (1985). The juror had approached a bailiff and expressed concern that one of the defendants, Gagnon, was sketching portraits of the jury. *Id.* at 523. The

judge spoke to the juror in chambers to see if the sketching caused prejudice. *Id.* Only Gagnon's counsel was allowed to participate in this discussion. *Id.* Although the juror expressed concern about "what could happen" after trial, he stayed on the jury. *Id.*

On appeal, the defendants in *Gagnon* argued that they had a constitutional right to be present during the in-chambers discussion. *Gagnon,* 470 U.S. at 524. The Ninth Circuit agreed, reasoning that the "juror's potential prejudice against Gagnon might harm all respondents because they were joint actors charged and tried together for conspiracy." *Id.* at 525. But the Supreme Court found it "clear" that "the presence of the four respondents *and their four trial counsel* at the *in camera* discussion was not required to ensure fundamental fairness." *Id.* at 526–27 (emphasis added). It reasoned that the ex parte meeting was "a short interlude in a complex trial," that the defendants "could have done nothing had they been at the conference, nor would they have gained anything by attending," and that "the presence of Gagnon and the other respondents, *their four counsel*, and the prosecutor could have been counterproductive." *Id.* at 527. (emphasis added).

Another useful example is *Gribble*, which involved a court's unrecorded ex parte questioning of prospective jurors on hardship and infirmity reasons for not serving. *State v. Gribble*, 2001 WI App 227, ¶¶ 7, 9, 248 Wis. 2d 409, 636 N.W.2d 488. In determining that this was not a critical stage, the court of appeals noted that the circuit court "was exercising its discretion . . . to excuse individuals not able to fulfill their responsibilities as jurors." *Id.* ¶ 16. Because the court's questioning was not aimed at eliciting information on a substantive matter like juror impartiality, no right-to-counsel violation occurred. *Id.*

Continuing the topic of whether the accused needs help confronting a legal problem, the Supreme Court has indicated

that a stage is not critical if counsel can later cure any prejudice resulting from the uncounseled event. *See Gilbert v. California*, 388 U.S. 263, 267 (1967) (dealing with the taking of handwriting exemplars). Similar logic supports Wisconsin's rule that a defendant has no right to counsel at a presentence investigation interview. *See State v. Knapp*, 111 Wis. 2d 380, 385, 330 N.W.2d 242 (Ct. App. 1983) (noting that counsel could address the report at sentencing). Likewise, in *Schmidt*, an *in camera* hearing for Schmidt to present evidence of an affirmative defense was not a critical stage because counsel assisted Schmidt at other times. *State v. Schmidt*, 2012 WI App 113, ¶¶ 45–47, 344 Wis. 2d 336, 824 N.W.2d 839.

In the context of whether the accused needs help "meeting his adversary," the Supreme Court has held that a postindictment photographic display is not a critical stage. *Ash*, 413 U.S. at 321. That's because "the accused himself is not present . . . [so] no possibility arises that the accused might be . . . overpowered by his professional adversary." *Id.* at 317; *accord Gerstein v. Pugh*, 420 U.S. 103, 122 (1975). The absence of an adversarial setting supports Wisconsin's rule that a defendant has "no right to counsel at [a] hearing on review of [an] indigency determination." *State v. Wickstrom*, 118 Wis. 2d 339, 347, 348 N.W.2d 183 (Ct. App. 1984).

From this survey of critical-stage cases, it's apparent that no matter how courts have described the relevant test, *Ash*'s instruction that a critical stage present "the same dangers that gave birth" to the right to counsel persists. *Ash*, 413 U.S. at 311. That is, the key to finding a critical stage is whether the event involves a confrontation between the defendant and his adversary, or a legal matter where the defendant stands to benefit from counsel's assistance. And under either scenario, it's relevant whether counsel could later cure any prejudice that results from the uncounseled event.

B. The circuit court's ex parte conference with Juror 2 was not a critical stage.

The alleged critical stage here was a narrow period after the close of evidence and before deliberations when the court communicated ex parte with Juror 2 about her fitness to continue serving. (Spencer's Br. 14–19.) During this time, the court (1) discerned the details of Juror 2's illness, (2) asked "if she thought she would feel well enough to proceed in any particular length of time," and (3) relayed defense counsel's question of whether her "not being well enough to proceed had anything to do with her service as a juror or with the behavior of any of the other jurors." (R. 184:20–22.) The court kept the attorneys apprised of what was happening throughout this preliminary assessment. (R. 184:21.)

It should be clear from the get-go: "[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right." *Gagnon*, 470 U.S. at 526 (citation omitted). Bearing in mind the historical lens through which the Supreme Court analyzes the right to counsel, the test for deciding if the above facts constitute a critical stage asks "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Ash*, 413 U.S. at 313.

Plainly, Spencer didn't require assistance in meeting his adversary. It's undisputed that neither the prosecutor nor an agent of the prosecution was present during the alleged critical stage. (R. 184:20–21; Spencer's Br. 15–19.) Indeed, Spencer doesn't contend otherwise. (Spencer's Br. 15–19.) His argument is that "there were legal issues to be addressed where trial counsel could have acted on behalf of her client, thus making the ex parte meeting a critical stage in the proceedings." (Spencer's Br. 19.)

The issue therefore narrows itself to whether what happened here is on a par with a court's ex parte communication about jury instructions, *see Mills*, 107 Wis. 2d at 370, or about what evidence could be viewed (or what defenses could be considered) during deliberations, *see Anderson*, 291 Wis. 2d 673, ¶¶ 13–14; *Bjerkaas*, 163 Wis. 2d at 957, or about which members of the venire should be excused for cause, *see Tulley*, 248 Wis. 2d 505, ¶¶ 6–11. Alternatively, is the event at issue more like the minor occurrence in *Gagnon*, or like the court's administrative questioning in *Gribble*, or like the situations in *Gilbert*, *Knapp*, and *Schmidt*, in that counsel could later cure any possible prejudice? It's the latter.

It bears emphasizing that the alleged critical stage involved information gathering, *not* the substantive decision to dismiss Juror 2 for cause. Spencer received the benefit of his counsel's advocacy on that substantive issue. (R. 184:21–25; Spencer's App. 110.) Defense counsel was briefed on the situation and involved in the decision to wait for Juror 2 to feel better. (R. 184:21.) Counsel also requested that the court ask Juror 2 whether her illness was a pretext, and the court acquiesced to counsel's request and relayed Juror 2's response. (R. 184:21–22.) Further, counsel had the opportunity to object to Juror 2's dismissal for cause, and she moved for a mistrial and renewed her *Swain* challenge following the court's ruling. (R. 184:23–25.)

That Spencer received such advocacy distinguishes this case from *Tulley*, *Mills*, *Koller*, *Anderson*, and *Bjerkaas*, where the defendants had no assistance regarding the substantive legal issues at play. Further, counsel's participation on the substantive issue draws parallels to *Gilbert*, *Knapp*, and *Schmidt*, in that counsel was available to cure any prejudice that occurred in her absence. And because counsel's absence occurred only when the court was eliciting information about the juror's illness and ability to proceed,

this case resembles the ex parte administrative questioning that was found unproblematic in *Gribble*. Not to mention, a "short interlude" like the one here has survived constitutional scrutiny even where the ex parte discussion involves a substantive matter like juror bias. *See Gagnon*, 470 U.S. at 526–27.

Still, as noted, Spencer argues that "there were legal issues to be addressed" during the court's ex parte communications with Juror 2. (Spencer's Br. 19.) Specifically, he reasons, "If counsel had been present, counsel could have thoroughly explored whether the nature of the juror's illness rose to the level of cause for dismissal, or whether her discomfort might have warranted a request for a continuance for a few hours, if appropriate, or even a day." (Spencer's Br. 18.) But the court informed counsel of Juror 2's symptoms, that she had been experiencing some "health issues," and that she didn't know how long it would take for her to feel better. (R. 184:20–21.) So, unless Spencer is saying that the court was an unreliable messenger, it's not clear why he believes counsel was ill-equipped to analyze Juror 2's dismissal for cause.

To the extent Spencer is suggesting that counsel's presence would have influenced Juror 2's answers regarding her illness and ability to proceed, it's worth noting a point that the court of appeals made in declining to extend the right to counsel to presentence interviews: the active involvement of an advocate "might seriously impede the ability of the trial court to obtain and consider all facts that might aid in forming an intelligent sentencing decision." *Knapp*, 111 Wis. 2d at 385; *see also Gagnon*, 470 U.S. at 527. Further, this Court has instructed that in deciding to discharge a juror for cause, the "court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by *prejudicing* in some manner *the juror potentially subject to discharge*." *Lehman*, 108 Wis. 2d at 300 (emphasis added).

The point is that there's a downside to Spencer's suggestion that counsel should have been allowed to employ her advocacy skills when the court discerned the details of Juror 2's illness and her ability to proceed. It could have interfered with the court's ability to make an informed decision, and it could have backfired if Juror 2 felt pressured or compelled to remain on the jury despite feeling "so unwell." (R. 184:21.)

Spencer's remaining argument is that if counsel had been present for the discussion of Juror 2's illness and ability to proceed, counsel could have "thoroughly investigated whether the fact the juror was the lone African-American on the panel contributed to her discomfort." (Spencer's Br. 18–19.) This argument fails for the same reasons above. Counsel was able to investigate whether Juror 2's illness was a pretext. If Spencer is saying this wasn't a thorough investigation because the court asked the question and relayed Juror 2's answer, he doesn't explain why courts can't be trusted in this regard.[2] (Spencer's Br. 18–19.) And again, if the suggestion is that counsel's presence could have influenced Juror 2's answer on this point, there are countervailing interests to consider. Counsel's advocacy could have impeded the court's ability to assess good cause for dismissal, and a thorough investigation of this issue (as Spencer sees it) could have prejudiced Juror 2.

The bottom line is that Spencer hasn't shown that he "required aid in coping with legal problems" during the alleged critical stage. *Ash*, 413 U.S. at 311. The aid he needed he received outside of the alleged critical stage. *Compare Gilbert*, 388 U.S. at 267; *Knapp*, 111 Wis. 2d 385; *Schmidt*,

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[2] Notably, during voir dire, defense counsel specifically asked Juror 2 whether she would be uncomfortable speaking her mind if she was the only black juror. (R. 177:117.) Juror 2 answered, "I was raised to speak my mind. . . . So I will speak my mind." (R. 177:117.)

344 Wis. 2d 336, ¶ 47. Nothing crossed a constitutional line. *See, e.g.*, *Gagnon*, 470 U.S. at 526–27; *Gribble,* 248 Wis. 2d 409, ¶ 16.

Finally, the State notes Spencer's reliance on *Alexander*. (Spencer's Br. 17.) That case doesn't control the outcome here. As Spencer indicates, the issue in *Alexander* was whether the defendant had a right to be present when the court held in-chambers discussions with two potentially biased jurors during trial. *Alexander*, 349 Wis. 2d 327, ¶ 2. This Court said that "whether a defendant must be present when a court meets with members of the jury 'admits of no categorial "yes" or "no" answer.'" *Id.* ¶ 25 (citation omitted). Rather, it depends on "what matters are discussed or passed upon." *Id.* ¶ 22. Using *Gagnon* as its guide, this Court held that Alexander's presence was not necessary to ensure a fair hearing. *Id.* ¶¶ 29–30.

Notably, the *Alexander* Court recognized *Gagnon*'s instruction that the "mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of *any* constitutional right." *Alexander*, 349 Wis. 2d 327, ¶ 29 (emphasis added) (citation omitted). Yet, this Court continued, "All that the Constitution requires at such a conference is the presence of defense counsel." *Id.* To the extent that this Court was endorsing a bright-line rule that counsel's presence is required whenever a court meets with a juror (even though it just eschewed a bright-line rule for analyzing the right to be present in that situation), that's inconsistent with *Gagnon*. *See Gagnon*, 470 U.S. at 526–27. It's also contrary to the fact-intensive nature of the right-to-counsel test, as demonstrated above. For these reasons, and because it's not a right-to-counsel case, *Alexander* does not control the outcome here.

This Court should hold that the circuit court did not violate Spencer's right to counsel.

C. Any error was harmless.

If this Court disagrees, harmless-error analysis applies, and the error was harmless beyond a reasonable doubt.

1. Harmless-error analysis applies.

Precedent supports applying harmless-error analysis to the claimed right-to-counsel violation.

Sometimes, "circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Those circumstances may arise when "the complete denial of counsel" occurs during a critical stage. *Id.* at 659. While a "complete" denial of counsel can mean situations where counsel is "either totally absent, or prevented from assisting the accused during a critical stage," the Supreme Court nevertheless has required the denial to be "complete" to warrant the presumption. *See Wright v. Van Patten*, 552 U.S. 120, 125 (2008); *Bell*, 535 U.S. at 696–97; *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *Smith v. Robbins*, 528 U.S. 259, 286 (2000); *Penson v. Ohio*, 488 U.S. 75, 88 (1988).

For this reason, "the presumption of prejudice is narrow" and "happens rarely." *Schmidt*, 911 F.3d at 479. "It arises only when the denial of counsel is extreme enough to render the prosecution presumptively unreliable." *Id.*

Wisconsin law is in accord. *See Anderson*, 291 Wis. 2d 673, ¶ 76. In fact, Wisconsin courts "have applied harmless error analysis to the denial of the Sixth Amendment right to counsel when the circuit court has had ex parte communications with the jury." *Id.* This includes communications between the court and a juror during deliberations, *id.*; *Koller*, 248 Wis. 2d 259, ¶ 61; *Bjerkaas*, 163 Wis. 2d at 957–58; *State v. Burton*, 112 Wis. 2d 560, 565–70,

334 N.W.2d 263 (1983), *overruled on other grounds by Alexander*, 349 Wis. 2d 327, ¶¶ 28–29, and those conducted during voir dire, *Tulley*, 248 Wis. 2d 505, ¶ 7. The reasoning is that "situations will inevitably arise in which the communication is so innocuous that it cannot be said that the error in any way influenced the jury's verdict." *Burton*, 112 Wis. 2d at 570.

Given this precedent, the issue of whether harmless-error analysis applies to what happened here isn't difficult to resolve. Had the alleged critical stage been the *entire* proceeding concerning Juror 2's dismissal, any argument that there was a complete denial of counsel warranting the presumption of prejudice would be meritless given counsel's advocacy on the issue. Perhaps recognizing as much, Spencer has narrowed the relevant stage to the court's communications with Juror 2 about her illness and ability to proceed. But this argument fares no better, as counsel's participation outside of those discussions renders them innocuous. That is, it cannot be said that the denial of counsel was extreme enough to warrant a presumption of prejudice when counsel was informed of the information gathered during the ex parte communications and had the opportunity to advocate for her client on the issue of Juror 2's dismissal. *Compare Penson*, 488 U.S. at 88 (presuming prejudice because "the denial of counsel . . . left petitioner completely without counsel during the appellate court's actual decisional process").

Further, even if Spencer had received *no* advocacy on the juror issue, it doesn't follow that the prosecution would be presumptively unreliable. This Court would ask if there's any "way to know whether . . . appropriate arguments . . . might have affected the ultimate judgment in this case." *Herring v. New York*, 422 U.S. 853, 864 (1975). It's one thing to say that it's hard to tell whether a counseled argument would have kept a sick juror on the jury. But it's quite another to say that

it's impossible to measure how this case would have turned out had Juror 2 deliberated when there was overwhelming evidence of Spencer's guilt. *Compare id.* at 864 (noting several holes in the prosecution's case in applying the presumption of prejudice). Thus, even assuming more aggravated facts than what happened here, Spencer still wouldn't have a strong argument for structural error.

Because any error here is quantifiable, harmless-error analysis applies.

Spencer doesn't acknowledge that "the presumption of prejudice . . . happens rarely," *Schmidt*, 911 F.3d at 479, but he seems to recognize he faces an uphill battle in convincing this Court to apply it here. (Spencer's Br. 27.) He offers no case—binding or otherwise—with remotely similar facts where prejudice was presumed. (Spencer's Br. 19–29.) For example, Spencer cites to this Court's decision in *S.M.H.*, which held "that a proceeding in which a court decides a disputed matter in favor of the State, before allowing the respondent the option of presenting his case-in-chief," constitutes structural error. *In re S.M.H.*, 2019 WI 14, ¶ 16, 385 Wis. 2d 418, 922 N.W.2d 807; (Spencer's Br. 21.) That's a lot different than what happened in this case, and so is denying a defendant his right to counsel of choice. (Spencer's Br. 22.) Spencer also relies on the non-binding *Hinton* decision to support his argument for structural error (Spencer's Br. 24–27), but *Hinton* applies a harmless-error analysis to a court's erroneous dismissal of a juror, *see Hinton v. United States*, 979 A.2d 663, 690 (D.C. 2009). So, *Hinton* only undermines Spencer's position.

That Spencer is hard-pressed to show how any denial of counsel here is extreme enough to warrant a presumption of prejudice isn't surprising given how rarely the presumption applies. To the extent he's claiming that a lack of a transcribed record makes this case unique enough to apply

the presumption (Spencer's Br. 29), he's incorrect. *See, e.g.*, *Tulley*, 248 Wis. 2d 505, ¶¶ 3, 11.

As shown below, any error in this case is capable of measurement, like most right-to-counsel violations. *See Schmidt*, 911 F.3d at 479.

2. There's not a reasonable possibility that the alleged error contributed to Spencer's conviction.

It's the State's burden to prove harmless error. *See Burton*, 112 Wis. 2d at 570. "An error is harmless if there is no reasonable possibility that the error affected the outcome of the trial." *Koller*, 248 Wis. 2d 259, ¶ 62. "A 'reasonable possibility' is one sufficient to undermine confidence in the outcome of the proceeding." *Tulley*, 248 Wis. 2d 505, ¶ 7.

A reviewing court considers "the totality of the circumstances" in evaluating harmless error. *State v. Hunt*, 2014 WI 102, ¶ 29, 360 Wis. 2d 576, 851 N.W.2d 434. Accordingly, in the context of ex parte communications between a court and the jury, courts have properly "examine[d] the circumstances and substance of the communication in light of the entire trial to determine whether the error was harmless." *Koller*, 248 Wis. 2d 259, ¶ 62.

To be clear, any error here would be the denial of Spencer's right to counsel during the court's limited discussion with Juror 2 about the details of her illness and her ability to proceed with deliberations. It's *not* "the dismissal of the juror," as Spencer claims. (Spencer's Br. 44, 46.) So, the specific inquiry is whether there's a reasonable possibility that counsel's absence during the ex parte discussions affected the outcome of Spencer's trial. *See Koller*, 248 Wis. 2d 259, ¶ 62.

To answer that question yes, this Court would need to make at least two tenuous assumptions. The first is that defense counsel's presence during the ex parte communications could have kept Juror 2—who by all accounts was sick—on the jury. It's difficult to imagine what defense counsel could have done in those moments that she did not later receive the opportunity to do once the court conferred with the parties about the situation. Again, Spencer's only ideas are that counsel could have "thoroughly explored" Juror 2's illness and "thoroughly investigated" whether it was a pretext. (Spencer's Br. 18.) Thus, the suggestion is that counsel could have elicited *more* information on these topics than did the circuit court, *and* the information could have improved the chances of keeping Juror 2 on the jury. There's no reason to believe that's true, and courts have consistently denied new trials where "the possibility of prejudice is found beyond a reasonable doubt to be merely speculative or hypothetical." *Mills*, 107 Wis. 2d at 372; *see also Burton*, 112 Wis. 2d at 572–73.

The second tenuous assumption this Court would need to make to find harmful error is that Juror 2's presence for deliberations could have led to a different trial outcome. There's nothing in the record to support that as a reasonable possibility.

Juror 2 was just as impartial as any other juror. *See Gribble*, 248 Wis. 2d 409, ¶ 12. The State agrees with Spencer that Juror 2 would have brought her "individual perspective[ ] and background to the jury room." (Spencer's Br. 23.) It also concurs with the premise that individual jurors may evaluate evidence differently. (Spencer's Br. 23.) But even the case that Spencer urges this Court to follow says, "In many cases, where twelve impartial jurors have voted unanimously to" convict, courts "might be persuaded that the erroneously removed thirteenth juror would not have viewed the evidence differently." *Hinton*, 979 A.2d at 691. "[F]or example . . . if the

government's case is strong and there is no reason apparent in the record to think the erroneously removed juror would have dissented, a reviewing court could be satisfied that the juror substitution had no substantial influence on the outcome." *Id.*; *accord State v. Monahan*, 2018 WI 80, ¶ 56, 383 Wis. 2d 100, 913 N.W.2d 894 (the strength of the State's case is an important factor in the harmless-error analysis).

That's this case. As a preliminary matter, nothing in the record supports the idea that Juror 2 would have dissented. *Compare Hinton*, 979 A.2d at 692 (the record contained evidence that the dismissed juror was skeptical "of the police testimony"). That leaves the strength of the State's case, which was overwhelming.

There seems to be no genuine dispute that an armed robbery caused T.M.'s death. The physical evidence and testimony of numerous witnesses established as much. Again, the unbiased Towns said that he saw two men rob R.S. at gunpoint and drag him into the street. (R. 181:134–42.) Within a minute, Towns heard "nothing but gunfire" from that area and saw R.S. flee. (R. 181:142–45.) R.S. confirmed this account and identified T.M. as the unarmed suspect. (R. 182:31–44.) Neighbors in the area, the "ShotSpotter," and Officer Ivy substantiated the claims of successive gunfire that night. (R. 179:62, 64–65, 67–69, 76–77; 181:94, 99–100, 106.) The ballistics showed that there were two shooters: one from a kitchen window at R.S.'s residence, and one near the area where police found a gold minivan and T.M.'s body. (R. 36; 56; 57; 180:11–12, 14–27, 30–31, 33–35, 79–85; 181:225–27.) T.M. sustained a gunshot wound to the head and died. The cause of death was homicide. (R. 181:218–19.)

In other words, it's clear that there was an armed robbery, which caused a shootout, which caused T.M.'s death. The real dispute here is whether the State had strong evidence that Spencer was the armed robber. (Spencer's Br. 46–50.) The answer is yes.

At the time of the armed robbery, R.S. knew Spencer. (R. 182:23–24.) In fact, Spencer had been looking for R.S. to settle a $5000 debt, and the man who approached R.S. that night asked, "Where is the money at?" (R. 182:23–24, 34, 40–41.) During the robbery, R.S. got dragged toward a gold minivan in the street. (R. 182:36.) Spencer's fingerprint was found on the van, and there were documents in his name inside the vehicle. (R. 83; 181:45–49, 53, 75.) By the way, Spencer was seen with the van and T.M. just hours before the robbery. (R. 181:83–97.)

Before R.S. even spoke with police, he identified Spencer as the armed robber. (R. 183:5–7, 10, 31–32.) He promised T.M.'s sister that he would tell police what happened, and he did. (R. 182:31–32; 183:10.) The jurors learned that R.S. initially identified Spencer, and they watched portions of R.S.'s interview with police. (R. 182:31–38; 183:30–41.) They also heard from Detective O'Day, who said that he never threatened R.S. to identify Spencer. (R. 183:37.) In fact, O'Day didn't start pressing R.S. about whether he had a gun that night until *after* R.S. identified Spencer. (R. 183:58.) Moreover, as with T.M.'s sister and police, R.S. told one of his girlfriends that a man named Spencer was involved in the robbery. (R. 182:45, 51.)

The jury had a front row seat to R.S.'s recantation, which was inconsistent. At times, he still identified Spencer as one of the suspects. (R. 182:24–25, 39–40.)

Finally, Spencer didn't present an alibi defense at trial. (R. 183:80–81.)

Thus, in terms of identification, the jury had a choice. Should it believe R.S.'s initial account, when there was a motive for Spencer to rob R.S., when Spencer was with T.M. hours before the robbery, when physical evidence connected Spencer to the scene, when R.S. accused Spencer *before* talking to police, and when Spencer had no alibi? Or should it

believe R.S.'s trial recantation, when he still sometimes identified Spencer, when the jury watched a portion of his purportedly threatening police interview, and when he accused Spencer *before* being questioned about having a gun that night? This isn't a difficult decision.

Spencer disagrees because there were other "identifiers" at the scene. (Spencer's Br. 47.) By this, he means a fruit punch bottle with R.S.'s roommate's DNA on it. (Spencer's Br. 47–48; R. 182:26–27.) It's unremarkable that police found a bottle containing Errion Green-Brown's DNA by his own house. Also, Green-Brown is the same roommate who showed up with R.S. to meet Towns after the armed robbery. (R. 181:151.) Why, after being scared for his life and fleeing the scene, would R.S. jump in the car with the roommate who robbed him to meet the tow truck driver? (R. 182:36–37, 46, 55.) Spencer's suggestion that Green-Brown was the armed robber is illogical. (Spencer's Br. 47–49.)

The other evidence that Spencer believes gave the jury pause was that the gold minivan was registered to a man named Justin Gray, and his paperwork and fingerprints (along with the fingerprints of two other individuals) were found on the vehicle. (Spencer's Br. 47.) Again, it's unremarkable that police found paperwork and fingerprints connected to the registered owner of the vehicle. It's also unsurprising that there would be other fingerprints on the van. That's because of the *remarkable* fact that Spencer was seen with the vehicle (and T.M.) hours before the robbery, demonstrating that Gray lent his car to other people. Further, the jury didn't hear testimony that R.S. owed money to Gray or anyone else—just Spencer.

Spencer also stresses R.S.'s recantation in arguing prejudice, but he downplays that R.S. identified him before speaking to police, which is what prompted the interview in

the first place.[3] (Spencer's Br. 48–49.) And he doesn't acknowledge that when R.S. did talk to police, he identified Spencer before being "repeatedly asked . . . if he had a gun." (Spencer's Br. 49.)

In short, the evidence was overwhelming, and there is no reason to believe that Juror 2 would have dissented. Thus, even under Spencer's preferred harmless-error analysis, there is no reasonable possibility that any right-to-counsel violation contributed to his conviction.[4] (Spencer's Br. 44–45.)

Finally, although it seems that Spencer's preferred harmless-error analysis narrowly focuses on the strength of the State's case, that's contrary to the totality-of-the-circumstances test that courts are supposed to employ. Because courts must evaluate the substance of the ex parte communication "in light of the entire trial," *Koller*, 248 Wis. 2d 259, ¶ 62, it's relevant that Spencer's deliberating jurors were impartial. Wisconsin law supports this proposition. *See Tulley*, 248 Wis. 2d 505, ¶ 11; *State v. Avery*, 2011 WI App 124, ¶ 58, 337 Wis. 2d 351, 804 N.W.2d 216 (dealing with the dismissal of a deliberating juror). Indeed, so does Spencer's preferred case, *Hinton*. *See Hinton*, 979 A.2d at 691. And it makes sense that the impartiality of the remaining jurors should factor into the analysis when the ultimate question is whether this Court lacks confidence in the outcome. *See Tulley*, 248 Wis. 2d 505, ¶ 7.

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[3] One of many reasons why the non-binding *Hobbs* is inapposite is that Quintessa Gaines credibly testified that R.S. told her that Spencer was the armed robber. (Spencer's Br. 45–49.)

[4] It's not accurate, as Spencer asserts, that the *Hinton* court said that "the government would rarely be able to show a lack of prejudice" when analyzing the loss of an empaneled juror. (Spencer's Br. 44–45.) The *Hinton* court retreated from a previous statement it made in that regard, acknowledging that "[i]n many cases" the government may succeed in showing harmless error. *Hinton v. United States*, 979 A.2d 663, 691 (D.C. 2009).

Spencer suggests that the court of appeals in this case found harmless error solely because there is no reason to question the impartiality of the deliberating jurors. (Spencer's Br. 19–20, 24, 28–29.) As noted above, however, this was one of two reasons why the court of appeals found harmless error. (Spencer's App. 110–11.)

If anything, the court of appeals' opinion suffers from being incomplete. It didn't consider the overwhelming evidence of Spencer's guilt in finding harmless error. *Compare Burton*, 112 Wis. 2d at 572–73. It's the strength of the State's case, the impartiality of the deliberating jurors, and the substance of the ex parte communications that makes any error here harmless.

II. Spencer forfeited his remaining challenges.

A. A defendant must properly preserve most issues to raise them on appeal.

"It is the often-repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal." *State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999) (citation omitted). This includes alleged constitutional errors. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *Id.*

"The [forfeiture] rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal." *Huebner*, 235 Wis. 2d 486, ¶ 12. "It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* This rule also "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and

later claiming that the error is grounds for reversal." *Id.* (citation omitted).

B. Spencer didn't raise his remaining challenges at the circuit court.

The court of appeals correctly held that Spencer forfeited his remaining arguments. (Spencer's App. 106–07.)

The analysis is straightforward. The circuit court dismissed Juror 2 for cause, and Spencer moved for a mistrial and renewed his *Swain* challenge "based on a concern that the jury would not be fair and impartial without an African-American juror." (Spencer's App. 107; R. 184:24–25.) In denying the motion for a mistrial, the court made the remarks that are the basis for Spencer's remaining constitutional and erroneous-exercise-of-discretion challenges.[5] (R. 184:25–27; Spencer's Br. 29–37.) But no objection was made to these remarks at trial, nor in Spencer's postconviction motion. (R. 147; 184:27.) Thus, he plainly forfeited the new challenges he brought at the court of appeals and attempts to revive here. *See Bodoh*, 226 Wis. 2d at 737.

Because Spencer's concern at trial was that his jury lacked racial diversity—not that his judge "commented on the racial characteristics of trial participants"—his argument against forfeiture is unavailing. (Spencer's Br. 33–37.) And Spencer offers no law supporting the proposition that counsel doesn't have to object when she's surprised by such allegedly improper remarks, nor when she figures an objection would

[5] Part of Spencer's erroneous-exercise-of-discretion claim is that the court didn't follow *Lehman* when addressing Juror 2's dismissal for cause. (Spencer's Br. 35–36.) No objection was made at trial on this basis, nor in his postconviction motion. (R. 147; 184:20–27.) Spencer doesn't attempt to argue that this issue wasn't forfeited. (Spencer's Br. 38–42.)

be fruitless. (Spencer's Br. 38–42.) It's his burden, and he's failed to meet it.

Spencer asks this Court to overlook his forfeiture, but there are three good reasons not to.

First, the remainder of Spencer's challenges are based on a false premise, which is that the court's allegedly improper remarks concerned its dismissal of Juror 2 for cause. (Spencer's Br. 24–42.) They don't. They constitute the reasoning for denying Spencer's motion for a mistrial, which arose because of Juror 2's removal: "We're now in a situation where we have no African-American jurors. And in a trial where the defendant is African-American. . . . I'm moving for a mistrial." (R. 184:24.)

When defense counsel was given the floor after the court signaled its decision to dismiss Juror 2, she didn't question that Juror 2 was sick, nor did she say anything about whether the illness constituted cause for dismissal. (R. 184:20–25.) Instead, her comments entirely focused on the effect of Juror 2's removal, namely, the absence of a black juror. (R. 184:20–25.) It was counsel's motion for a mistrial based on the lack of racial diversity that prompted the court's challenged remarks: "I think it's important to note their race for the record as . . . the defense has raised the issue." (R. 184:27.) And the postconviction court's order denying relief confirms that "the court set forth its reasons why it was denying the motion [for a mistrial], noting in its reasons that many of the witnesses for the State were African American as well." (Spencer's App. 141.)

Thus, the record reveals that the court did not state or suggest that the "decision to remove the juror was appropriate because of the racial characteristics of the trial participants." (Spencer's Br. 41.) Spencer's remaining arguments therefore miss the mark, leaving this Court with no developed

challenges to what actually happened at the circuit court.[6] This is a good reason to hold Spencer to the forfeiture doctrine.

Second, regarding Spencer's constitutional claims, there is a substantial sandbagging concern because he seeks automatic reversal. Specifically, he argues that those claims should not be evaluated for harmless error. (Spencer's Br. 34.) Allowing a defendant to seek "automatic reversal" without a timely objection would "encourage[ ] gamesmanship." *State v. Pinno*, 2014 WI 74, ¶ 61, 356 Wis. 2d 106, 850 N.W.2d 207. Along the lines of gamesmanship, the State also notes that if Spencer's claims *are* subject to a harmless-error type analysis, he has shifted the burden to address the harmlessness of any potential error onto the State by not following the "normal procedure" of raising his claims through the rubric of ineffective assistance of counsel. *See State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

Third, in a case like this one, where Spencer "essentially assert[s] that the trial court's decision was discriminatory" (Spencer's App. 107), the circuit court should have been given the opportunity to address its remarks after evaluating Spencer's challenges. *See Huebner*, 235 Wis. 2d 486, ¶ 10. Spencer has questioned why the court said what it said (Spencer's Br. 37), and he could have found out had he followed the normal procedure for preserving issues for appeal. Appellate courts could have benefited from that explanation, too.

For the above reasons, this Court should apply the forfeiture doctrine to Spencer's remaining claims.

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[6] The State argued only forfeiture at the court of appeals, so it didn't catch Spencer's oversight until preparing alternative arguments for this Court.

III. Spencer hasn't established a constitutional violation.

Spencer claims that the circuit court's consideration "of the race of the trial participants" violated his rights to due process and equal protection. (Spencer's Br. 29–34.) As noted, the challenged statements were part of the court's reasoning for denying his motion for a mistrial based on the jury's lack of racial diversity.

Spencer's claims are largely undeveloped, so the State has difficulty in responding here. He neither analyzes exactly what happened at the circuit court, nor does he provide much of a framework for deciding whether he has proved a constitutional violation.

Spencer references "equal protection principles" but does not state what they are, or how they apply to the facts of this case. (Spencer's Br. 31–34.) "Equal protection guarantees require that persons similarly situated be accorded similar treatment." *In re Commitment of Curiel*, 227 Wis. 2d 389, 413, 597 N.W.2d 697 (1999). Thus, Spencer must show that the circuit court "treats members of similarly situated classes differently." *State v. Post*, 197 Wis. 2d 279, 318, 541 N.W.2d 115 (1995); *accord State v. Johnson*, 74 Wis. 2d 169, 173–75, 246 N.W.2d 503 (1976). The only binding authority Spencer offers establishes as much—each Supreme Court case addresses differential treatment for jury selection purposes. (Spencer's Br. 31–32.)

Spencer doesn't identify a group of similarly situated persons "for purposes of an equal protection comparison," *Post*, 197 Wis. 2d at 319, nor does he offer any instances of differential treatment at the circuit court. His equal protection claim therefore doesn't make it out of the starting gate. *Compare Post*, 197 Wis. 2d at 323 (comparing "the differences in substantive standards for commitment between chapter 51 and chapter 980"), *with Johnson*, 74 Wis. 2d at 175

("There must be some showing of persistent failure to prosecute men as well as women involved in prostitution. The isolated facts of this case are insufficient.").

Spencer's due process claim isn't entirely clear. He doesn't seem to contend that the circuit court was biased against him because of his race. (Spencer's Br. 29–34.) Instead, Spencer's argument (properly framed) appears to be that the court's consideration of race in denying a mistrial motion (based on race) was fundamentally unfair. He cites to this Court's decision in *Harris*, which recognizes that defendants have "a constitutional due process right not to be sentenced on the basis of race." *State v. Harris*, 2010 WI 79, ¶ 33, 326 Wis. 2d 685, 786 N.W.2d 409.

But there's a difference between a court sua sponte factoring the defendant's race into sentencing and what happened here. Context matters. *See Harris*, 326 Wis. 2d 685, ¶ 45; *see also State v. Fuerst*, 181 Wis. 2d 903, 912–13, 512 N.W.2d 243 (Ct. App. 1994) (there must be a reliable nexus between a defendant's crime and his religious beliefs for a court to consider religion at sentencing). "A mistrial is appropriate when 'an event during trial has a real likelihood of preventing a jury from evaluating the evidence fairly and accurately, so that the defendant has been deprived of a fair trial.'" *United States v. Powell*, 652 F.3d 702, 709 (7th Cir. 2011) (citation omitted). Spencer's motion for a mistrial was premised entirely on "a concern that the jury would not be fair and impartial without an African-American juror." (Spencer's App. 107; R. 184:24–25.) So, it's not altogether surprising that the court discussed race in denying Spencer's motion.

In fact, the court's comment about the lack of a cross-racial identification in this case (R. 184:26), was not totally off base. *See State v. Roberson*, 2019 WI 102, ¶ 105, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting) (collecting authorities) ("The risk of mistaken eyewitness identification is even greater when the identification involves a suspect of a

different race."). Nor, in deciding whether Spencer could receive a fair trial in Juror 2's absence, was its remark that this case didn't involve a "crime allegedly committed by a person of one race upon the victim of another race." (R. 184:26).

As argued below, because the circuit court wasn't given the chance to explain its remarks, the State believes that this Court should affirm on alternative grounds. But the point for now is that Spencer's attempt to constitutionalize what happened here is unpersuasive. The long and short of it is that, as Spencer concedes, he's found no case with remotely similar facts supporting the conclusion that a constitutional violation occurred. (Spencer's Br. 31.) He's failed to meet his burden.

If this Court disagrees, as demonstrated below, any error is both capable of assessment and harmless. The circuit court would have denied a mistrial even without considering the race of the trial participants.

IV. This Court should affirm the circuit court's decision denying a mistrial on alternative grounds.

The circuit court's task when faced with Spencer's motion for a mistrial was to determine whether, given Juror 2's dismissal, he could receive a fair trial. At the time, the court had 12 impartial jurors ready to deliberate. It's entirely possible that the court intended to communicate that it saw nothing that threatened the presumption of impartiality such that a mistrial was warranted. But Spencer never gave the court a chance to explain its remarks after evaluating his current challenge.

Given the absence of an explanation for the circuit court's remarks, and because the circumstances plainly didn't warrant a mistrial, the State asks this Court to affirm on alternative grounds.

A. If a circuit court reaches the right result for the wrong reason, it will be affirmed.

"It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute*. "An appellate court is concerned with whether the decision . . . is correct, not whether . . . the circuit court's reasoning is." *Liberty Trucking Co. v. Dep't of Indus., Lab. & Hum. Rels.*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). This general rule applies to discretionary decisions. *See, e.g.*, *State v. Sorenson*, 143 Wis. 2d 226, 250, 421 N.W.2d 77 (1988).

B. A mistrial is an extreme remedy.

"A mistrial is appropriate only when a 'manifest necessity' exists for the termination of the trial." *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). "A motion for a mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial." *Id.* A circuit court "is in the best position to determine the seriousness of the incident in question, particularly as it relates to what has transpired in the course of the trial." *United States v. Clarke,* 227 F.3d 874, 881 (7th Cir. 2000).

C. Nothing prejudicial necessitated a mistrial here.

Spencer requested a mistrial because there were no black jurors set to deliberate. That is not a reason for a mistrial. The Supreme Court has "never invoked the fair-cross-section" requirement of the Sixth Amendment "to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." *Lockhart v. McCree*, 476 U.S. 162, 173 (1986). That's because "of the

practical impossibility of providing each criminal defendant with a truly 'representative' petit jury." *Id.* at 174.

Further, the remaining 12 jurors were presumed impartial. *See Gribble*, 248 Wis. 2d 409, ¶ 12; *see also State v. Gilliam*, 2000 WI App 152, ¶ 5, 238 Wis. 2d 1, 615 N.W.2d 660 ("Jurors are presumed impartial."). Indeed, Spencer questioned his prospective jurors about racial bias during voir dire. (R. 177:117–18, 134–35.) And the circuit court had no reason to question the remaining jurors' impartiality at the time of Spencer's motion. *Compare State v. Delgado*, 223 Wis. 2d 270, 272–73, 588 N.W.2d 1 (1999) (juror disclosed being a victim of child sexual assault during deliberations at trial for child sexual assault).

Therefore, plainly, "the basis for the mistrial motion" was not "sufficiently prejudicial to warrant a new trial." *Adams*, 221 Wis. 2d at 17. Regardless of the circuit court's reasoning, it reached the right result, so this Court must affirm. *Holt*, 128 Wis. 2d at 124.

Finally, although it's unnecessary to consider Spencer's erroneous-exercise-of-discretion argument, the State reiterates that the circuit court did *not* rule that the race of the trial participants justified excusing Juror 2 for cause. (Spencer's Br. 36–37.)

V. The circuit court's process for discharging Juror 2 didn't constitute an erroneous exercise of discretion, and any error was harmless.

If this Court overlooks Spencer's forfeiture of his argument that the circuit court's process for discharging Juror 2 was flawed under *Lehman*, he loses on the merits.

"[T]he circuit court has discretion to discharge a regular juror during trial for cause." *Lehman*, 108 Wis. 2d at 299. The issue in *Lehman* was whether the court erred in discharging a deliberating juror who fell ill. *Id.* at 295–96.

In resolving the issue, this Court discussed best practices for courts to follow in discharging a juror "whether before or after deliberations have begun." *Lehman*, 108 Wis. 2d at 300. A court has a duty "to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror." *Id.* "[G]enerally," the "inquiry . . . should be made . . . in the presence of all counsel and the defendant." *Id.* But the "court's efforts depend on the circumstances of the case." *Id.*

The problem in *Lehman* was that there was "no record that the circuit court exercised the discretion vested in it to discharge a juror." *Lehman*, 108 Wis. 2d at 301. In fact, it wasn't even clear that the court itself discharged the juror, nor "whether the juror was questioned to determine how ill she was or whether she might be able to rejoin the jury within a short time." *Id.* And, "neither the defendant nor the state was given an opportunity to be present when the ill juror was discharged." *Id.* Very simply, it was unknown if the court "exercised its discretion to discharge the juror or on what basis the court reached its decision." *Id.*

That's not what happened here. As noted, the court *did* question the juror about her illness and ability to proceed, *did* involve the parties in the decision to dismiss the juror, and *did* discharge the juror and explain its reasons for doing so on the record. It's simply not hard to analyze whether the court exercised its discretion and on what basis it reached its decision.

Spencer's suggestion that the court's limited, ex parte questioning of Juror 2 violates *Lehman* is unpersuasive because *Lehman* does not mandate any hard-and-fast rule. (Spencer's Br. 36.) The court's process for discharging a juror depends on the circumstances, and the State has already explained why the court may not have wanted to involve everyone in discerning the details of Juror 2's illness and ability to proceed.

Moreover, it's not true, as Spencer claims, that "the record does not reflect that the inquiry was carefully done with an eye toward retaining the juror." (Spencer's Br. 36.) The court talked to the juror about her illness, gave her time to rest, asked if she'd feel better soon, asked if the illness was a pretext, and involved the parties along the way.

Because *Lehman* is clearly distinguishable, Spencer's erroneous-exercise-of-discretion claim fails. Regardless, for the reasons already explained in Section I.C.2. above, any error is harmless.

CONCLUSION

This Court should affirm Spencer's convictions.

Dated this 19th day of October 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 10,997 words.

Dated this 19th day of October 2021.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (2019–20).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of October 2021.

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